STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
FITZGERALD, P.J., COOPER AND WILDER, J.J.

FREDA ALIBRI,

Plaintiff/Appellant,

v.

DETROIT WAYNE COUNTY STADIUM AUTHORITY,

Defendant/Appellee.

Supreme Court No. 123091

Court of Appeals No. 228921

Circuit Court Case No. 98-818620 CK

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PLAINTIFF-APPELLANT'S REPLY BRIEF ON APPEAL

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INTRODUCTION

The Stadium Authority remains committed to convincing this Court that its pretextual condemnation and the published Opinion of the Court of Appeals should be affirmed based on a set of "assumptions" that have never existed. The Stadium Authority's tactic is designed to distract this Court from treating this case, as the Trial Court did, for what it is – an improper use of the Stadium Authority's power of eminent domain to take property from one private party for the benefit of another private party that led to a purchase agreement that was subsequently rescinded because it was executed based on certain covenants that could not be satisfied, and premised on certain fundamental representations that were not true. It is vitally important that the Stadium Authority's strategy fail. Not only is the final and rightful return of Alibri's property at stake, but so too is the protection of property owners from the pretextual condemnation strategy employed by the Stadium Authority which, as a result of the Court of Appeals' decision, is precedent in this State. These interests can only be protected by reversing the Court of Appeals.

ARGUMENT

I. This Court Should Not Ratify the Court of Appeals' Improper Disregard of the Trial Court's Discretion

The decision to rescind the underlying contract in connection with the west-side properties is an equitable remedy within the sound discretion of the Trial Court. Dingerman v Reffitt, 152 Mich App 350, 355; 393 NW2d 632 (1986). As such, the Court of Appeals was required to find an abuse of discretion in order to reverse the Trial Court. As this Court held in Alken-Ziegler, Inc. v Waterbury Headers Corp., 461 Mich 219, 227-228; 600 NW2d 638 (1999):

> An abuse of discretion involves far more than a difference in judicial opinion. [citation omitted]. It has been said that such abuse occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather passion or bias.'

The Stadium Authority misstates the standard of review in this case as simply de novo. (See Stadium Authority Brief at p. 13). The Court reviews a grant of summary disposition *de novo*; however, rescission of contract is an equitable remedy granted in the sound discretion of the trial court, and a trial court's factual findings in reaching its decision to rescind are reviewed for clear error. (Apx. 74a); Dingeman v Reffitt, 152 Mich App 350, 355; 393 NW2d 632 (1986); Lenawee Board of Health v Messerly, 417 Mich 17, 31; 331 NW2d 203 (1982). Clear error occurs only where the reviewing court is left with a "definite and firm conviction that a mistake was made." Westlake Transportation, Inc v PSC, 255 Mich App 589; 662 NW2d 784 (2003).

The Court of Appeals' decision is simply a substitution of its opinion for that of the Trial Court's. In reaching this result, the Court of Appeals adopts the Stadium Authority's repeated misstatements of the findings of the Trial Court. Specifically, the Stadium Authority repeatedly and erroneously asserts that the Trial Court rescinded the underlying contract because (1) the Stadium Authority did not intend to acquire the Abraham property, and (2) the Stadium Authority violated the Uniform Condemnation Procedures Act ("UCPA"). (Stadium Authority Brief at pp. 15-18). The Stadium Authority spends the balance of its brief explaining why these "findings" are erroneous. The Stadium Authority made the same erroneous description of the Trial Court's July 11, 2000 Order to the Court of Appeals, which reviewed the case (as mis-described by the Stadium Authority) and erroneously found an abuse of discretion.

Specifically, nowhere in the Trial Court's Order is there a finding that the underlying contract should be rescinded because the Stadium Authority did not "intend" to purchase the

Abraham property. Rather, the Trial Court properly found that the contract should be rescinded based on mutual mistake of fact, innocent misrepresentation and failure of consideration, as a result of the Stadium Authority's agreement to acquire the Abraham property when it never had the ability to secure the acquisition. (Apx. 58a-67a). Simply put, the Trial Court found that there was a promise in the contract and, based on the undisputed fact that promise was illusory, rescission was warranted.

Likewise, the Trial Court did not order rescission of contract because the Stadium Authority violated the UCPA by filing a complaint for condemnation without a plan or funding. Rather, the Trial Court properly found that the contract was entered into under a threat of condemnation when, in fact, such threat was illusory since the Stadium Authority could not have condemned at the time it threatened to, because it lacked the necessary prerequisites of a plan and the funds to pay for the land.

When the Trial Court's actual opinion is reviewed, rather than the one manufactured by the Stadium Authority and Court of Appeals, this Court should conclude that the Court of Appeals committed reversible error in finding that the Trial Court abused its discretion.

II. Additional Misstatements By The Stadium Authority

A. A Partial Rescission Is Proper

The Stadium Authority attempts to distract this Court from the error of the Court of Appeals by suggesting that the ability to rescind a portion of an agreement is a questionable legal proposition. (See Stadium Authority's Brief at p. 1, F.N. 1). This Court in Blumrosen v Silver Flame Industries, Inc, 334 Mich 441, 446; 54 NW2d 712 (1952) flatly rejected the Stadium Authority's position: "A partial rescission, however, may be allowed where the contract is a divisible one." This Court in Blumrosen defined a divisible contract as:

> ... a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

Id at 445.

In the present case, the underlying contract involved a purchase price for east-side properties and a separate purchase price for west-side properties. (Apx. 65b-69b). At the request of the Stadium Authority, two deeds were issued, one for the east-side properties and one for the west-side properties; two closings occurred, and two sets of closing documents were executed. (Apx. 65b-69b). The east-side properties were transferred based on a value of approximately $70.00 per square foot, and the west-side properties were transferred for $6.50 per square foot (with the covenant), and that price was specifically set forth. (Apx. 65b-69b). As such, the contract at issue is clearly a divisible one.[1]

B. The Stadium Authority Did Threaten To Immediately Condemn

In an effort to distance itself from its abusive threat to immediately condemn Alibri's property if she did not sell, the Stadium Authority appears to contend that it committed tax fraud. Specifically, the Stadium Authority suggests that it only provided the October 31, 1996 letter threatening condemnation (Apx. 117a) at the request of Alibri so she could avail herself of certain tax savings and not because it actually did threaten to immediately condemn. (See Stadium Authority Brief at p. 27, F.N. 15). Notwithstanding the Stadium Authority's bizarre position, the record evidence unquestionably demonstrates that Alibri's property was acquired under threat of condemnation. (Apx. 103a; 114a). As discussed throughout, this threat was illusory and should result in the return of the underlying property to Alibri.

[1] The divisibility of the contract is clearly demonstrated by the Detroit Tigers' unencumbered operation of its Stadium where Alibri's east-side properties were located despite Alibri's rightful possession of the west-side properties for over three years.

C. The Stadium Authority Has No Meaningful Response To Support The Court Of Appeals' Erroneous "Waiver" Argument

In response to Alibri's well-supported argument that the Court of Appeals committed reversible error by finding Alibri waived the Abraham covenant by closing on the property, the Stadium Authority resorts to unsupported conclusory statements, name calling and a misunderstanding of the record. It was always understood that the Abraham provision would not be triggered until after the closing on the underlying property. In fact, the option agreement was signed on October 31, 1996, which was the Stadium Authority's deadline to have enough property under control to secure the Tigers' and Lions' commitment to the project. (Apx. 114a). During this time, Ilitch-controlled entities were busy acquiring properties in the west project area. (Apx. 146a-155a).

If condemnation was necessary to acquire the Abraham property, the purchase price for that property would not have been known for two or three years depending on the appellate process. This, of course, never occurred since Ilitch-owned entities acquired the Abraham property a few months after the Alibri closing. (Apx. 146a-154a). Obviously, the Stadium Authority was not going to condemn property owned by one of its partner's entities.[2]

More importantly, Mr. Duggan himself acknowledged that the Stadium Authority would, to this day, pay Alibri the amount paid for the Abraham property. (Apx. 116a). As such, even the Stadium Authority admits that Alibri did not waive this provision in January 1997 when she

[2] The inclusion of the Abraham covenant in the contract is further evidence of the Stadium Authority's illusory threat to condemn not only Alibri's property but the entire west-side Project Area. This was the understanding which led to the execution of the contract and, for the reasons set forth in the Trial Court's Order, is why the contract was partially rescinded.

closed on the property in January 1997.[3] Despite not raising this meritless argument, the Stadium Authority suggests that this Court should adopt the erroneous finding by the Court of Appeals because Alibri is simply "a disgruntled party facing justice for the first time." (See Stadium Authority Brief at p. 43).[4]

There is no dispute that the contract covenanted that Alibri would receive what the Stadium Authority paid for the neighboring property which it covenanted to acquire along with all west-side properties in the Project Area. (Apx. 115a, 121a). The facts demonstrate that Alibri's alleged lack of "knowledge" regarding the acquisition of the Abraham property is irrelevant since the Stadium Authority covenanted to acquire the Abraham property and all west-side properties when, in fact, it could not and never attempted to do so. (Apx. 5a; 128a; 135a). As a result, the Trial Court properly rescinded the contract and the Court of Appeals' insertion of waiver into this case should be reversed.

D. The Alleged Bias Of The Trial Judge Is A Red Herring

In an effort to justify its wrongful conduct, the Stadium Authority suggests that the trial judge was biased against it because of certain comments made regarding his personal disagreement with the decision in Poletown Neighborhood Council v Detroit, 410 Mich 616; 304 NW2d 455 (1981). An inferior Court is well within its discretion to express its personal

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[3] The Stadium Authority weakly attempts to minimize Mr. Duggan's admission as a non-binding "willingness to acquiesce" or a willingness "to be fair." (See Stadium Authority Brief at p. 43). Mr. Duggan's affidavit makes no reference to any sense of "fairness." Rather, it explicitly acknowledges that the "agreement" remained in effect after the closing in January 1997. (Apx. 116a).

[4] The Stadium Authority omitted appendix citations supporting its assertion that Alibri is "disgruntled" or "facing justice for the first time." Alibri is unaware of any such record support. Indeed, many of the "factual" assertions made by the Stadium Authority fail to reference any record support. Similarly, the Stadium Authority has skirted the Court Rules and filed a brief of 50 pages that contains numerous and lengthy footnotes in a point smaller than the required 12 point.

disagreement with controlling authority, as long as it faithfully applies it (if applicable). Of course, that is all that occurred in this case, and the Stadium Authority can point to no evidence that the Trial Court failed to follow the law in Michigan. Moreover, if the Stadium Authority actually believed the Trial Court was biased against it, the proper action would have been to file a Motion to Disqualify under MCR 2.003. The Stadium Authority did not file such a Motion because the trial judge did nothing other than apply Michigan law.[5]

E. Ilitch-Controlled Entities Are The Primary Beneficiaries Of The Stadium Authority's Acquisition And MCL 213.72 Does Not Alter The Propriety Of The Trial Court's Rescission

In an effort to respond to Alibri's contention that the Stadium Authority is doing indirectly what it cannot do directly, the Stadium Authority goes so far as to suggest that there is no evidence that Ilitch-controlled entities are the primary beneficiaries of this acquisition. (See Stadium Authority Brief at p. 46). This position is incredible. Ilitch-controlled entities stand to obtain valuable property worth over $2 million based on a 16-month (interest free) loan of $264,551.94. The property was acquired by way of threat of condemnation, and a covenant to acquire the neighboring property and to pay Alibri the same price. To suggest that the Ilitch-controlled entities are not the primary beneficiaries of the Stadium Authority's grab of Alibri's west-side properties is simply to ignore the facts.

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[5] Likewise, the Stadium Authority repeatedly states that Alibri drafted the contract and, therefore, any ambiguity must be construed against it. As with much of its brief, this statement is false and without any record support. Attorneys for both parties participated in the drafting of the underlying contract and, therefore, the Stadium Authority is not entitled to the inference it desires. Homac, Inc v DSA Financial Corp, 661 F Supp 776, 788 (ED Mich, 1987) ("we note that the rule of contra proferentum is one of last resort . . . [and] the justification for applying such rule pales in a situation, like the instant one, **where the terms of the agreement resulted from a series of negotiations between experienced drafters.)** Moreover, the contract is not ambiguous and, thus, the Stadium Authority's discussion of this issue is superfluous. Wilkie v Auto-Owners Ins Co, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

The Stadium Authority further contends that it is free to acquire property and do with it what it pleases pursuant to MCL 213.72. As the court in Troy v Barnard, 183 Mich App 565, 572; 545 NW2d 378 (1990) stated, "[h]owever, this statute [MCL 213.72] does not grant the authority to purposefully obtain more property than is necessary for the stated project." Yet, this is exactly what the Stadium Authority is suggesting it has the power to do under the UCPA. Indeed, the Court of Appeals has essentially held that it is proper for a condemning authority to bluff condemnation and make certain covenants in order to acquire property, only to later give the property away to another private party without satisfying its covenant.[6]

Moreover, the powers of the Stadium Authority are statutorily limited. MCL 123.951, et seq. Nowhere in the statute is a Building Authority, like the Stadium Authority, provided the power to (1) borrow money from a private entity, or (2) sell property to a private entity. MCL 123.958, 123.958a, 123.959. Yet, this is exactly what the Stadium Authority suggests it had every right to do. It statutorily does not, and the Court of Appeals should be reversed for its erroneous expansion of the Stadium Authority's statutorily limited powers.

F. Stadium Authority's Inconsistent Opinions Argument Is Without Merit And Was Properly Rejected By The Court Of Appeals

As with the other arguments set forth in the Stadium Authority's Brief, no meaningful legal authority is identified in support of its contention that the Trial Court rendered inconsistent findings. Incredibly, the Stadium Authority fails to even explain how the Trial Court's rulings were inconsistent. Rather, the Stadium Authority suggests that because the Trial Court rejected two of its Motions for Summary Disposition and one Motion to Strike that it was somehow estopped from ruling in favor of Alibri at a later date. Such a proposition lacks all credibility, is

[6] As discussed by the amicus in this case, the Stadium Authority's pretextual condemnation is wholly improper and in contravention of eminent domain case law from across the country.

contrary to Michigan law and is why even the Court of Appeals rejected the argument.[7] Belt v Ritter, 18 Mich App 495; 171 NW2d 581 (1969) (denial of a motion for summary judgment would not preclude a renewal of the motion); Meagher v Wayne State Univ, 222 Mich App 700; 565 NW2d 401 (1997)[8]

Moreover, the cases cited by the Stadium Authority are distinguishable and fail to support its request for affirmance. Each of the decisions cited involve a trial court's conclusion of law that was premised on a finding of fact that was inconsistent with that conclusion. Here, the Trial Court's finding of a genuine issue of material fact in response to the Stadium Authority's Motions, and subsequent finding that no genuine issue of fact exists in response to Alibri's Motion, is entirely consistent with its conclusions of law.

G. Alibri's Property Was The Only Property Acquired By The Stadium Authority On The West Side

The Stadium Authority falsely states that it acquired other properties on the west side. (See Stadium Authority Brief at p. 33, F.N. 18). The testimony, however, demonstrates that the Forbes' property was acquired by the DDA, not the Stadium Authority (Apx. 135a), and the referenced Appendix citations (Apx. 135a) do not reflect any reference to the purported inter-governmental transfer of property between the City and the Stadium Authority. Thus, the facts show that only the Alibri property was targeted by the Stadium Authority to assist Ilitch-owned entities which were simultaneously acquiring the other lots in the west-side Project Area.

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[7] Likewise, the Stadium Authority's suggestion that summary disposition was inappropriate because Alibri identified 37 questions of fact in the Joint Final Pretrial Order is absurd. (See Stadium Authority Brief at p. 9). Those facts remained unresolved, at the time, solely because the Stadium Authority refused to stipulate. The Stadium Authority's refusal to stipulate, however, does not render summary disposition inappropriate.

[8] In Meagher, the Court rejected plaintiff's claim that the successor judge in the trial court committed reversible error is dismissing her due process claim because that claim had survived a previously filed motion for summary disposition. Id. at 718.

H. The Stadium Authority Misrepresents Its Knowledge Of Stadium Locations

In an effort to cleanse itself of impropriety, the Stadium Authority suggests it decided to rescind its Declaration of Necessity regarding the west side in May 1998 when it determined where the Stadiums would be located. (Stadium Authority Brief at p. 40). The facts, however, are that the Stadium Authority knew the Stadiums would be located on the east side when it approached Alibri in 1996 – two years earlier. In fact, Jerald Rosenfeld testified that the location of the Stadiums on the east side was not "even an issue" as of August 1996. (Apx. 88a-89a). Thus, Stadium Authority knew the stadiums would be on the east side when it approached Alibri and its objections to this undisputed fact calls into question the veracity of its entire brief.

CONCLUSION

The Stadium Authority's response brief, like the Court of Appeals' decision, is premised on fiction. When this Court analyzes the Trial Court's actual written Order and applies the undisputed facts to Michigan law, the contract should be rescinded and Alibri should have her property returned. The Court of Appeals' published Opinion is reversibly erroneous, and should not be left for future parties to cite as support for improper conduct at the expense of a property owner.

Respectfully submitted,

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